III. THE 1996 ACT PROHIBITS THE COMMISSION FROM APPLYING THE IMPAIR STANDARD ON A SERVICE-BY-SERVICE BASIS.

The Commission instituted a subtle but extremely dangerous shift in its approach to EELs in the *Supplemental Order Clarification*. Perhaps in recognition of the futility of trying to justify use restrictions on UNEs under the statute and the Commission's prior decisions, the FCC suggested for the first time that a UNE itself might be defined by the use to which it is put by the requesting carrier. In order to effectuate this novel approach, the Commission suggested, again for the first time, that the impair standard must be applied to any particular network functionality on a service-by-service basis. These novel statutory interpretations must be rejected because they are contrary to the statute and represent bad public policy.

A. It Is Contrary to the 1996 Act To Apply the Impair Standard on a Service-By-Service Basis.

The Commission has never before applied the impair standard on a service-by-service basis. In fact, until the *Supplemental Order Clarification*, it was well-settled that the plain language of the 1996 Act required the Commission to apply the impair standard to specific network functionalities, not on a service-by-service basis. As the Commission explained in the *Local Competition First Report and Order*, "the language of section 251(c)(3), which provides that telecommunications carriers may purchase unbundled elements in order to provide a

telecommunications service, is not ambiguous."[56] Up to and including the *UNE Remand Order*, the FCC has always applied the impair standard on a functionality-by-functionality basis.

The service-by-service approach suggested in the *Supplemental Order Clarification* is contrary to the statutory language. Section 251(d)(2) expressly provides that the Commission shall apply the impair standard for the purpose of determining "what *network elements* should be made available."[57] The term "network element" is defined in Section 153(24) as a "facility or equipment" and includes all "features, functions, and capabilities that are provided by means of such facility or equipment."[58] The Commission's own definition of the term "network element" mimics the statutory language.[59] It is contrary to those unambiguous statutory and regulatory provisions for the Commission to suggest now that a particular functionality qualifies as a UNE depending upon the service it is used to provide.

In the *Supplemental Order Clarification*, the Commission claimed that application of the impair standard on a service-by-service basis is "similar" to the approach the Commission used in the *UNE Remand Order*.[60] As evidence of this similarity, the Commission pointed to its observation in the *Third Report and Order* that it is "appropriate for us to consider the particular types of customers that the carrier seeks to serve" because "Section 251(d)(2)(B) requires us to

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56 *Local Competition Order*, 11 FCC Rcd at 15679, ¶ 356. The Commission codified its interpretation of section 251(c)(3) in Rule 51.309(a), which provides that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on request for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends." 47 C.F.R. § 51.309(a). This rule was not challenged in court by any party, as the Commission pointed out in the *UNE Remand Order*. *UNE Remand Order* at ¶ 484.

57 47 U.S.C. § 251(d)(2).

58 47 U.S.C. § 153(24).

59 47 C.F.R. § 51.5.

60 *Supplemental Order Clarification* at ¶ 15.

consider whether lack of access to the incumbent LEC's network elements would impair the ability of the carrier to provide the *services* it seeks to offer."[61] However, this observation is not evidence that the Commission applied the impair standard on a service-by-service basis in the *UNE Remand Order*. To the contrary, the Commission applied the impair standard on a functionality-driven basis. The Commission considered the types of customers that carriers seek to serve not in order to determine who is entitled to receive access to a particular unbundled network element, but rather in order to assess whether CLECs could feasibly self-provision the functionality or reasonably acquire it from a third-party supplier. Put in other words, although the Commission can consider the services that carriers may use a functionality to provide when necessary to apply intelligently the impair standard, the Commission's task is to determine whether *the functionality* does or does not qualify as a mandatory network element. The Commission does not have the authority to define the term "network element" more narrowly than the statute by specifying the services that it may be used to provide.

B. It Is Contrary to the Supreme Court Decision To Apply the Impair Standard on a Service-By-Service Basis.

The Supreme Court endorsed applying the impair standard on a functionality-by-functionality basis when it upheld the Commission's rules and policies on UNEs in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999). In that decision, the Court held that the FCC's application of the "network element" definition was "eminently reasonable."[62] Moreover, the Court explained that "Section 251(d)(2) does not authorize the Commission to create isolated exemptions from the underlying duty to make all network elements available. It requires the

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61 *UNE Remand Order*, 15 FCC Rcd 3737-38, ¶ 81 (emphasis in original).

62 *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. 721, 734 (1999).

Commission to determine on a rational basis *which* network elements must be made available."[63] Therefore, the Commission cannot define UNEs by the telecommunications services they are used to provide.

The Court's holding in *AT&T Corp. v. Iowa Utilities Board* that the Commission did not adequately consider the "necessary and impair" provisions has no effect on the Commission's long-standing practice of applying the impair standard on a functionality-by-functionality basis. In fact, the Court identified only two flaws in the Commission's application of the impair standard. First, the Commission improperly disregarded the availability of elements outside the network when determining whether the failure to obtain access to nonproprietary elements would impair the ability to provide services.[64] Second, the Commission improperly regarded *any* "increased cost or decreased service quality" as establishing an impairment of the ability to provide service.[65] Neither finding even arguably casts doubt on the Commission's traditional approach of applying the impair standard (as it did on remand from the Supreme Court) on a functionality-by-functionality basis. Therefore, the Commission was flatly incorrect to suggest that the Supreme Court mandated (or even approved) a service-by-service approach to the impair standard.

C. It Is Contrary to Past FCC Decisions To Apply The Impair Standard on a Service-By-Service Basis.

In the *UNE Remand Order*, the Commission did not apply the impair standard on a service-by-service basis. Rather, the Commission applied the new impair standard in the *UNE Remand Order* to specific network functionalities to compile a new list of the network elements

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63 *Id.* at 736.

64 *Id.*

65 *Id.*

that must be unbundled. Based on a functionality-driven application of the impair standard, the Commission found various functionalities to be mandatory UNEs without engaging in a service-by-service approach, including loops; subloop elements; the network interface device; switching; transport, signalling and call-related databases; and operations support systems.[66] Although the Commission sought comment on whether certain statutory provisions may permit use restrictions on UNEs, the Commission never once suggested that the scope of the UNE itself could be narrowed by the services the UNE was used to provide.

Even when the Commission first imposed the EEL restrictions in the *Supplemental Order*, the Commission nowhere claimed that the impair standard could be applied on a service-by-service basis. Rather, the Commission's EEL restrictions governed the use, not the definition, of the UNEs which together constitute the EEL. The Commission sought to justify the EEL restrictions as merely a "temporary transitional mechanism to help complete all of the steps toward the pro-competitive goals of the 1996 Act, including the full implementation of a competitively-neutral system to fund universal service and a completed transition to cost-based access charges." Therefore, the Commission urged parties to consider and address what long-term solutions, other than use restrictions, may be necessary to avoid adverse effects on any special access revenues that support universal service.[67]

It was not until the *Supplemental Order Clarification* that the Commission suggested that it might be consistent to apply the impair standard on a service-by-service basis.

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66 *See, e.g., UNE Remand Order* at ¶ 15. Similarly, the FCC established the high-frequency loop UNE in December, 1999 without engaging in a service-by-service application of the impair standard. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of* 1996, CC Docket No. 98-147, FCC 01-26 (rel. Jan. 19, 2001) ("*Line Sharing Remand Order*").

67 *Supplemental Order* at ¶ 6.

In this order, the Commission claimed that the Court's decision in *Iowa Utilities Board* made it appropriate to revisit the impair standard again, despite the fact that the Commission had already implemented the Supreme Court's decision without using a service-by-service approach in *Third Report and Order*. Further, as noted above, the Supreme Court's decision upheld the Commission's functionality-driven approach to applying the impair standard, and does not state or suggest that a service-by-service approach was mandated by Congress. In short, the service-by-service approach to applying the impair standard did not exist until the Commission invented it in the *Supplemental Order Clarification* as a means of shoring up a deficient legal justification for imposing use restrictions on EELs.

D. It Is Contrary to the Statutory Nature of UNEs To Apply the Impair Standard on a Service-By-Service Basis.

Application of the impair standard on a service-by-service basis is contrary to the very nature of UNEs as facilities, equipment and functionalities.[68] As the Commission has explained, "when interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access 'service,'"[69] but rather access to a functionality that, when combined with other functionalities, can be used to provide "a telecommunications service." Once a requesting carrier purchases access to an element, it can use the element at its, and its customer's, discretion to provide any technically feasible telecommunications service. The Commission recognized this point when it held that "network elements are defined by facilities or their functionalities or capability, and thus, cannot be defined as specific services."[70]

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68 As explained above, the Supreme Court explicitly affirmed the Commission's interpretation of UNEs as functionalities and facilities in *AT&T v. Iowa Utilities Bd.*

69 *Local Competition Order* at ¶ 358.

70 *Id.* at ¶ 264.

Given the nature of UNEs as functionalities and facilities, the availability of a UNE in the marketplace – the critical statutory inquiry that the Commission must undertake when applying the impair standard – has absolutely nothing to do with the particular service the requesting carrier will provide using the UNE. For example, one's ability to buy a backhoe in the marketplace does not depend upon whether one plans to construct a driveway or a swimming pool. If the backhoe is neither available from third-parties nor able to be manufactured by the competitor itself at a reasonable cost, the competitor will be impaired in its ability to provide service regardless of whether that service is the construction of driveways or swimming pools. Therefore, the inquiry that the Commission is now conducting – an exploration of the connection between the local exchange and exchange access market – is irrelevant to the application of the impair standard.

E. It Is Contrary to Fundamental UNE Policies To Apply the Impair Standard on a Service-By-Service Basis.

The Commission's decision to experiment with a service-by-service application of the impair standard would result in the direct repudiation of policies previously considered to be necessary and appropriate to ensure that Section 251(c)(3) achieves the pro-competitive purposes desired by Congress. In particular, the Commission suggests that it should examine whether "local exchange service" and "special access" are so intertwined as to make a single impairment analysis appropriate for both market segments.[71] However, in conducting such an inquiry, the Commission inevitably will run afoul of its fundamental policy decision to determine whether a specific functionality qualifies as a mandatory UNE without taking into account the functionality's availability as a tariffed service offering by the ILEC.

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[71] *Supplemental Order Clarification* at ¶ 14.

As the Commission explained in the *Third Report and Order*, little weight is assigned in the "impair" analysis to the "ability of a requesting carrier to use the incumbent LECs' resold or retail tariffed services as alternatives to unbundled network elements."[72] This stems from the Commission's conclusion in the *First Report and Order* that allowing ILECs to deny access to unbundled elements solely, or primarily, on the grounds that an element is equivalent to a service available at resale would lead to impractical results; ILECs could completely avoid Section 251(c)(3)'s unbundling obligations by offering unbundled elements to end users as retail services. Thus, "[d]enying access to unbundled elements on the grounds that an incumbent LEC offers an equivalent retail service could force requesting carriers to purchase, for example, an unbundled loop and switching out of an incumbent's retail tariff at a wholesale discount, subject to all of the associated tariff restrictions."[73] In effect, the impair standard cannot be applied meaningfully, and as Congress intended, if the Commission takes into account the tariffed monopoly service offerings of the ILECs.

Any analysis of the relationship between local exchange and special access services when applying the impair standard will run afoul of this fundamental rule. The reason is that the special access market segment is, for all practical purposes, dominated by the tariffed special access services of the ILECs. Therefore, to examine the "special access" options available to new entrants in the marketplace today inevitably will focus on the functionalities that carriers may purchase directly from the ILECs' tariffs. This is precisely the type of inquiry which the Commission decided it would not conduct when applying the impair standard. For example, the Commission will not determine whether carriers are impaired without access to

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72 *UNE Remand Order* at ¶ 67.

73 *Id.*

loops as mandatory UNEs by examining the retail local exchange services that a carrier may be able to purchase out of an ILECs' tariffs. The same conclusion applies to any examination of the "special access" market segment. The Commission must reject the service-by-service approach to applying the impair standard because it will bring the Commission squarely into conflict with its well-established policies on implementing Section 251(c).[74]

IV. THE COMMISSION SHOULD NOT ADOPT ANY FURTHER "INTERIM" RESTRICTIONS ON EELS.

The Commission cannot justify any EEL restrictions on the theory that they are "interim" in nature. The Commission claims that its decision to impose an "interim" use restriction is consistent with its "finding in the *Local Competition First Report and Order* that [it] may, where necessary, establish a temporary transitional mechanism to help complete all of the steps toward the pro-competitive goals of 1996 Act, including the full implementation of a competitively-neutral system to fund universal service and a completed transition to cost-based access charges."[75] As such, the Commission seeks to rely on the Eighth Circuit's decision in *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) ("*CompTel*"), which upheld a unique transitional rule that the Commission adopted in the *Local Competition First Report and Order*.

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74 In addition, the Commission should be careful before undertaking any inquiry into "marketplace developments" in the wake of the *UNE Remand Order*. *See Supplemental Order Clarification* at ¶ 16. The Commission has previously indicated that it will not apply the impair standard for one functionality based on the services that a carrier may provide using other UNEs. *See UNE Remand Order* at ¶ 51 (holding that impair analysis requires FCC to examine availability of functionalities "outside the incumbent's network"). As a result, it would be impermissible, and contrary to the Commission's previous holdings, to find that the impair standard is not met for EELs because of marketplace developments directly attributable to the wider availability of UNEs mandated by the Commission in the *UNE Remand Order*.

75 *Supplemental Order* at ¶ 7.

The Commission's reliance on the *CompTel* decision is misplaced. In *CompTel*, the Eighth Circuit upheld a transitional rule that applied during the nine-month period between the August 1996 statutory deadline for implementation of section 251, which requires cost-based rates for unbundled network elements, and the May 1997 statutory deadline for implementation of section 254, which is designed to promote universal service. The transitional rule allowed ILECs to continue assessing interstate access charges on top of UNE rates until the May 1997 statutory deadline because access charges contained implicit subsidies for universal service.[76]

In *CompTel*, the court agreed with the Commission that a temporary deviation from the Act's mandate of cost-based charges was necessary to ensure a smooth transition to implement another of the Act's mandates, the reform of universal service.[77] Specifically, the pricing decision in *CompTel* was required by explicit and necessarily conflicting statutory provisions and deadlines imposed on the Commission. Although the Commission had to adopt its UNE rules by August 1996, Section 254 did not require a decision on universal service until May 1997. The Court found that, due to the nine month disparity between these statutory deadlines, "universal service soon would be nothing more than a memory" without an interim pricing rule.[78] Thus, the rule was necessary "in order to effectuate" Section 254.[79] In upholding the temporary rules, the court declined to determine whether the Commission's approach was the best way to maintain universal service on a transitional basis because the temporary rule had a fixed expiration date that coincided with the statutory deadline for universal service reform.

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76 *See Local Competition Order* at ¶ 720.

77 *CompTel*, 117 F.3d at 1074 ("We do not think it contrary to the Act to institute access charges with a fixed expiration date, even though such charges *on their face* appear to violate the statute, in order to effectuate another part of the Act.").

78 *Id.* at 1074.

79 *Id.*

The circumstances in *CompTel* that led the Eighth Circuit to allow universal service principles temporarily to take precedence over the pricing standards of the 1996 Act no longer exist. The statutory deadlines for implementation of sections 251, 252 and 254 have long passed. Moreover, there are no universal service subsidies built into special access rates, and the Commission has already removed the implicit universal service subsidies from access charges while creating a more explicit universal service funding mechanism. Thus, the nine-month period between the statutory deadlines for implementation of section 251 and section 254 is no longer relevant, and there is no need to harmonize apparently conflicting provisions of the Act. Lastly, in sharp contrast to the transitional rule reviewed in the *CompTel* decision, the use restriction at issue here is inconsistent with the plain language of the Act, and is not necessary to effectuate any other parts of the Act. Certainly, there is no longer any credible argument that the EEL restrictions are necessary to preserve universal service subsidies built into switched access charges.

V. THE ACT PROHIBITS RESTRICTIONS ON CO-MINGLING

ILECs have used the illegal use restrictions that the Commission imposed in the *Supplemental Order* and extended indefinitely in the *Supplemental Order Clarification* as a sword to deny requesting carriers the ability to combine UNEs with other types of traffic that they route over facilities or services obtained from the ILECs. The Commission now requests comment on whether it should modify or continue its prohibition on the "co-mingling" of UNEs with tariffed access services.[80]

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[80] *Notice* at ¶ 3.

CompTel strongly opposes the Commission's prohibition of co-mingling. In addition to constituting a use restriction in violation of the 1996 Act, the co-mingling prohibition is bad public policy. The co-mingling language in the Commission's order has been used by ILECs to force their competitors to operate two separate networks – one for UNE traffic and another for other traffic – even when it is significantly more efficient from both an economic and an engineering standpoint to route all traffic over a single integrated network.

For example, many CLECs desire to take advantage of economies of scale by extending their DS-3 trunks as far into the local exchange network as possible, while using DS-1 trunks to bring traffic from more distant end offices to these DS-3 trunks. The DS-1s can carry both UNE and non-UNE traffic. In the absence of an illegal use restriction, CLECs could purchase their local transport via UNEs instead of special access. Accordingly, a CLEC could convert its DS-1 lines that it uses to carry local traffic into UNEs, bring those DS-1s to an end office with a DS-3 that the CLEC has purchased out of the ILECs' special access tariff, and then multiplex the DS-1s onto the DS-3. However, the Commission's co-mingling policy can be construed to prohibit such an efficient routing configuration, thereby forcing the CLEC to resort to network routing configurations that are more expensive and less efficient.

Any such co-mingling prohibition discriminates against CLECs because it would require them to incur additional costs to construct duplicative networks that the ILECs are not required to construct: one to carry UNE-only traffic and one to carry all other traffic. Moreover, co-mingling has no impact whatsoever on the Commission's unbundling requirements, because the ILECs would continue to be compensated for access services at their tariffed rates. Thus, the co-mingling prohibition is blatant discrimination that fails to promote competition or any other discernible public policy.

A co-mingling prohibition also would force CLECs to bear the additional discriminatory cost of acting as an "insurer" of its customer's future use of communications. Given the constantly changing usage patterns of telecommunications services, which are driven by factors beyond the CLEC's control (*i.e.*, Internet, packetized voice, externally accessed computer applications), the "risk" that the Commission has transferred from the ILEC to the CLEC is not only impossible to quantify or valuate (because historical customer usage patterns will not allow a reliable prediction of future use), but also another form of an illegal use restriction.

VI. THERE IS NO NEED TO DETERMINE WHETHER THE EXCHANGE ACCESS MARKET IS DISTINCT FROM THE LOCAL EXCHANGE MARKET TO APPLY THE IMPAIR STANDARD

In the *Notice,* the Commission asks a series of questions about whether the exchange access and local exchange markets are so interrelated from an economic and technological perspective that a finding that a network element meets the "impair" standard under section 251(d)(2) of the Act for the local exchange market would itself entitle competitors to use that network element solely or primarily in the exchange access markets.[81] As explained above, the Act requires that the Commission to apply the impair standard on a functionality-by-functionality basis. As such, a finding that a functionality meets the "impair" standard entitles carriers to use that network element to provide any telecommunications service, including exchange access service. Therefore, it is unnecessary and legally irrelevant to determine whether the exchange access and local exchange markets are interrelated for purposes of Section

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81 *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, Public Notice, CC Docket NO. 96-98, DA 01-169 (rel. Jan. 24, 2001).

251(d)(2). Accordingly, CompTel does not here address the empirical issues raised by the Commission.

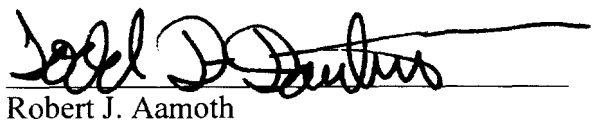
The Commission also requests comment on issues relating to whether carriers are impaired without access to EELs in the special access and private line market. However, the Commission found in the *UNE Remand Order* that EELs meet the impair standard. Consequently, carriers are impaired without access to EELs no matter what service they seek to provide. Therefore, it is not necessary or appropriate to revisit the Commission's findings of impairment in the *UNE Remand Order*, and CompTel does not address that issue further in these comments.

CONCLUSION

For the foregoing reasons, the Commission should act promptly to ensure that all requesting carriers have the unrestricted use of all UNEs and UNE combinations, including the EEL. The Commission also should take this opportunity to clarify the scope of Section 51.315(b) as specified herein.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

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